United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

No. 2663.

ARIZONA COPPER ESTATE, a Corporation,
Appellant,

vs.

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, Jr.,
Appellees.

BRIEF ON BEHALF OF APPELLEES.

SAMUEL L. KINGAN,
HARTWELL P. HEATH,
Attorneys for Watts and Davis.

HERBERT NOBLE,
SAMUEL L. KINGAN,
Of Counsel.

C. G. Burgoyne, 72 to 78 Spring Street, New York.

INDEX.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

No. 2663.

ARIZONA COPPER ESTATE, a corporation,
Appellant,

vs.

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, JR.,
Appellees.

BRIEF ON BEHALF OF APPELLEES.

Statement of the Case.

This is an appeal by the Arizona Copper Estate from a decree of the District Court of the United States for the District of Arizona (Rec., pp. 63–67), filed April 2, 1915, in which the Court found that the two instruments (rec., pp. 72, 73, 77–80) are to be construed as one instrument, and constitute a conditional sale of certain land in Santa Cruz County, Arizona, for $100,000, to be paid according to the tenor and effect of certain notes; that the condition was not performed, and that no part of said sum of $100,000 was ever paid; that the defendant (Appellant Arizona Copper Estate) acquired no right, title or interest, under or by virtue of the instruments, in the land

or any part thereof; and thereupon the Court adjudged that the full legal title to the said land was in the plaintiffs; that said instruments constituted a cloud upon the plaintiffs' title; that the title to the land was quieted in the plaintiffs against the defendants and each of them, and all persons claiming under them or any of them, and that the defendants and each and every one of them, and all persons claiming under them or any of them, be barred and estopped from having or claiming any right or title to the said land.

In the Court below certain other persons were joined as defendants, but they defaulted at the hearing and, though notice that the Arizona Copper Estate would appeal was given them and they were required to join in the appeal (rec., pp. 84, 85) they failed to do so; so that the Arizona Copper Estate is the sole appellant.

Statement of Facts.

On August 3, 1899, Captain Alexander F. Mathews and Samuel A. M. Syme were the owners of the land described in the complaint situate in Santa Cruz County, State of Arizona, and which is particularly described by courses and distances in the complaint (rec., p. 3).

For some time prior to August 3, 1899 (rec., p. 31), negotiations had been in progress between Mr. Syme and Senator Stephen W. Dorsey for the sale of the property; an option first having been proposed (rec., p. 32), to which Senator Dorsey objected on the ground that he wished a deed as he could handle the property better in that way (rec., p. 32); and which negotiations resulted in an agreement that Senator Dorsey should pay Mr. Syme personally $5,000 (rec., p. 32) for procuring the deeds of the property and arrange for the payment of $100,000, no title to pass unless the $100,000 was paid (rec., pp. 32–34). The papers Plaintiffs' Exhibits B and C (rec., pp. 72–80) were drawn up at Senator Dorsey's office in New York (rec., p. 34).

Mr. Syme testified (rec., p. 32):

> "We first talked about an option and we couldn't agree on that because he wanted a deed, because he said that he thought he could use that better. I had made

the proposition that I would sell him that property for $5,000 cash to me personally for procuring the deed, and he wanted to give me a deed in exchange at the same time."

Mr. Syme says (rec., p. 35) :

"My dealings were entirely with Senator Dorsey and I made my agreement with Senator Dorsey. And Dorsey conducted the entire transaction vis-a-vis me and Captain Mathews. There was nobody else."

Again (rec., p. 37) :

"Dorsey gave directions to Mathews how to draw the papers and Dorsey told Captain Mathews to put in the name Arizona Copper Estate as grantee in one paper and grantor in the other. Prior thereto I had never had any dealings with nor heard of the Arizona Copper Estate. My dealings have been entirely with Dorsey. Notes aggregating $100,000 were written out and signed by the Arizona Copper Estate by Jas. Simmons, Vice-President" (rec., p. 37).

"If the notes were not paid—all the notes were not paid—the property was to remain in us (Mathews and Syme) and the notes were to become void and the whole thing wiped out (rec., p. 34).

"It was stated by Captain Mathews, or by me, or by Senator Dorsey, at the meeting of August 3, 1899, that if these notes were not paid the whole thing amounted to nothing and we stood just as we did before, that the whole transaction would be null and void, including the notes and that the title would be in Mathews and myself if all the notes were not paid and we would get the property" (rec., p. 44).

Again Mr. Syme testified that in the presence of Senator Dorsey

"I just simply asked Captain Mathews what would be the nature of the case if these notes were never paid.

> He says the property will stand just as it did before—that is the title in Mathews and myself " (rec., p. 46).

Mr. Syme also testified :

> " I considered the paper in the nature of an option and that it conveyed the property to the Copper Estate and that it reconveyed it to us to secure the property to us if the notes were not paid. * * * " (rec., p. 48).

It was conceded by the Arizona Copper Estate that no payment was made on the notes (rec., p. 37) ; and that the property described was segregated from the public domain by the filing of the plat of survey in December, 1914, and that the property at the time of the commencement of the action and at the time of the hearing exceeded in value the jurisdictional amount (rec., p. 49).

It does not appear that the Arizona Copper Estate ever did anything in connection with this property in the way of taking possession of it or exercising any acts of ownership in connection therewith, or of control over it ; and Mr. Syme testified that " understanding that the whole thing has been abandoned " (rec., p. 39) " in the Fall of 1900 or thereabouts he went to see William H. Reynolds who it appears from the testimony of his grandson (rec., p. 50) was President of the Copper Estate at the time of the transaction, in reference to the purchase of the property (rec., pp. 39, 40).

During the course of the trial a motion was made by the plaintiffs (appellees) that the attorney for the Arizona Copper Estate be required to show under what authority he was acting for the Arizona Copper Estate ; and, when required to do so by the Court (rec., pp. 35–37), Mr. Hill produced a telegram signed "The Arizona Copper Estate by Stephen W. Dorsey, President."

Thereafter the plaintiffs (appellees) offered in evidence a sworn statement of Senator Dorsey (rec., p. 52), as to which the Counsel for the Arizona Copper Estate said (rec., p. 54). " We consent to the admission of this paper as a declaration against interest."

It appearing that Dorsey was president when the telegram was signed, the presumption is that he was president when he made the affidavit (Wigmore, sec. 437).

That paper is printed at length (rec., pp. 81-83). In it Senator Dorsey says (rec., pp. 81, 82):

> "It was finally agreed that the purchase price of the property should be One hundred thousand ($100,000) Dollars, to be paid in various sums and at various times running over about two years. My plan was to form a corporation to which the property could be deeded and which could then raise on the property a sum sufficient to pay the purchase price. It was, therefore, arranged that the property should be deeded to the corporation, but as the sale was not to be made unless and until the price was paid, it was arranged that the corporation would reconvey the property to the then owners subject to the divestiture if the purchase price was paid as agreed.
>
> * * * * * * *
>
> This form was adopted as the simplest and the one which would enable the corporation to handle the property easiest in raising the money required. There was never any intention that in case the corporation should not be able to raise the money, it should be indebted to those named in the amount of the notes or in any amount. All the parties knew that the corporation was to be organized to handle this proposition and that it had and expected to have no other assets but what it could make out of this property.
>
> "Soon after the deeds were made, I went to the Interior Department at Washington, D. C., to investigate the condition of the title to the Float. Before starting the corporation going, but after consulting fully with the attorney for the Land Office, I found out that the title to the property was so complicated that nothing could be done with it in a commercial way and I then and there decided to abandon the whole transaction. * * *
>
> "Nothing further was done in the matter by me or my associates and my understanding has always been and is now that the transaction on account of the failure of the Arizona Copper Estate to make the payments agreed on was as though it had never taken place and

> that Mathews and Syme had the title to the property free of any claim on the part of those who had proposed to organize the corporation or of the Arizona Copper Estate itself."

As showing the impression made upon the court by the reading of this confession by the man who conducted the negotiations, engineered the putting into shape the formal contract and organized and controlled the Arizona Copper Estate and who, as President of that corporation, employed the attorney in this case and authorized him to defend the suit according to that attorney's own showing, attention is called to the colloquy between the court and defendant's counsel appearing in the record (rec., pp. 52-54).

An examination of the notes which are recited in the instrument (rec., 77-80), which appellants claim to be a mortgage corroborates Col. Syme that the $5,000 was paid to him personally for the option, as he termed it.

It appears that the notes aggregated $100,000 (rec., p. 79); that Mathews received notes for $26,758; Mathews as trustee for Miss Eldredge received notes for $20,000, Syme received notes for $29,121 (rec., p, 61, 62), and presumably the balance $24,121 went to Boyce. Consequently the $1,000 paid Mathews out of the $5,000 was deducted from the notes given him and added to those given Syme as was the $2,000 deducted from the notes given Boyce and added to those given Syme.

Syme testified (rec., p. 34):

> " The $5,000 was not to be a part of the purchase price but was to come to me personally. He was to pay me $5,000 for giving him an option for a certain period."

and (rec., p. 41):

> " The $5,000 which passed in New York was Dorsey's checks, one for $2,000 to me, another for $1,000 less the war stamps to Capt. Mathews and another to Boyce for $2,000. The notes were then and there divided

between Mathews, Boyce and myself, Boyce receiving about $25,000."

and (rec., p. 43):

> " Capt. Mathews as trustee received $20,000 of the notes. Capt. Mathews personally $26,758, Col. Boyce $24,121 and I received $29,121 of the notes. Of the $5,000 of my individual money I gave $1,000 of it to Capt. Mathews because he had been to a great deal of expense in this business and had done a lot of work. That $1,000 was deducted from his original share of the notes. The same was with reference to the $2,000 to Boyce. Under the circumstances I thought that when we were getting $100,000 for our interest in the Float we were getting a good price for it. I directed Senator Dorsey to give Mathews and Boyce checks for $1,000 and $2,000 respectively."

There was no debt created nor did any debt exist. Simply if the Arizona Copper Estate paid $100,000 at the times and in the manner described in the notes it would acquire title to the land.

Syme testified (rec., p. 46) :—

> " Neither Capt. Mathews nor myself borrowed any money from the Copper Estate, nor from Senator Dorsey, Simmons nor Philip K. Reynolds."

and (rec., p. 46) the witness stated, under objection of the defendant and exception, that neither he nor Capt. Mathews borrowed or loaned or owed any money to any of the persons or the corporation above named, and that neither Senator Dorsey nor the Copper Estate nor any of the persons named on that day owed any money to Mathews or Syme ; and Syme testified further (rec., p. 46) :—

> " Q. You neither borrowed or loaned ?
> " A. Oh, no, there was no money transaction of that kind."

Dorsey's testimony to the same effect has been quoted.

There was no evidence in contradiction of or in conflict with the foregoing and the contract testified to by Syme and Dorsey is in support of and not in conflict with the papers themselves according to the natural purport and meaning of the language used.

In *Bogk v. Gossert*, 149 U. S., 17, the court says of *Wallace v. Johnstone*, 129 U. S., 28 :

> " The purport of this case is that in the absence of proof of a debt or other explanatory testimony the parties will be held to intend exactly what they have said upon the face of the instruments."

Read together the two papers clearly provide that if the Arizona Copper Estate shall pay the $100,000 as agreed it shall have the property. The promise to pay is not inconsistent with this. If the covenant as to the power to sell be so considered, it alone can not make the instrument a mortgage where there is no debt to be secured. That is the *sine qua non* of a mortgage (Words and Phrases, v. 5, p. 4601 and cases cited) and both Syme and Dorsey testify that there was no debt here and there is nothing to contradict them.

The foregoing statement of facts would seem to render a discussion of the law unnecessary.

POINTS.

I.

The intention of the parties controls if consistent with the principles of law and to ascertain such intention all the surrounding circumstances are to be considered.

In *Hollingsworth v. Fry*, 4 Dall., 345, the court says (p. 347):

> "The great rule of interpretation with respect to deeds and contracts is to put such a construction upon them as will effectuate the intention of the parties if such intention is consistent with the principles of law."

The real principle upon which this case turns is stated in *Russell v. Southard*, 12 How., 139, where the court says (p. 147):

> "To insist on what was really a mortgage as a sale is in equity a fraud which cannot be successfully practiced under shelter of any written papers however precise and complete they may appear to be."

This was said in reference to a deed which it was claimed was a mortgage but the fact that such cases are more numerous than those in which a paper in the form of mortgage is claimed to be a conditional sale does not affect the application of the principle to the latter class of cases.

It is a primary canon of interpretation that the intention of the parties controls, if to do so violates no rule of law.

Reeds vs. Proprietors of Locks & Canals, 8 How., 274.
Newson v. Pryor, 7 Wheat., 7, 10.
Holmes v. Trout, 7 Pet., 171.
St. Louis v. Rutz, 138 U. S., 226, 243.
St. Clair Co. v. Lovingston, 23 Wall., 46.
Meredith v. Picket, 9 Wheat., 573.
McKey v. Hyde, 134 U. S., 84, 95.

Morris v. United States, 174 U. S., 196, 246.
Reloj Cattle Co. v. United States, 184 U. S., 624, 637.
Ainsa v. United States, 161 U. S., 208.
Ely v. United States, 171 U. S., 220.
United States v. Maish, 171 U. S., 242.
Perrin v. United States, 171 U. S., 292.

In *Cavazos v. Trevino*, 6 Wall., 773, the court held that in construing a grant the circumstances attendant at the time it was made are competent evidence for the purpose of placing the court in the same situation and giving it the same advantage for construing the papers which are possessed by the actors themselves.

In United States v. Gibbons, 109 U. S., 200, the court says :

> " Where the language is susceptible of two meanings the court will infer the intention of the parties and their relative rights and obligations from the circumstances attending the transaction."

In Rock Island Railway v. Rio Grande Railroad, 143 U. S., 596, the court says (p. 609) :

> " In the interpretation of any particular clause of a contract, the court is not only at liberty but required to examine the entire contract and may also consider the relations of the parties, their connection with the subject matter and the circumstances in which it was signed."

In Vance v. Anderson, 113 Cal., 532, 45 Pac., 816, the court says (p. 538) :

> " Equity * * * shapes its relief in such a way as to carry out the true intent of the parties to the agreement ; and to this end all the facts and circumstances of the transaction, the conduct of the parties thereto, and their declarations against their own interests, and their relation to one another and to the subjects matter are subjects for consideration." Citing *Campbell v. Freeman*, 99 Cal., 516, 34 Pac., 113 ; *Peirce*

v. Robinson, 13 Cal., 116 ; *Locke v. Moulton*, 96 Cal., 21, 30 Pac., 957 ; *Ross v. Bruisse*, 64 Cal., 245, 30 Pac., 811 ; *Taylor v. McLain*, 64 Cal., 513, 2 Pac., 399.

In *Sadler v. Taylor*, 38 S. E., 583, the court says (p. 590) :

> " In ascertaining what the intention of the parties was at the inception of the transactions it is proper to consider the parole declarations of the parties and the evidence of other witnesses together with the situation, circumstances and conduct of the parties respecting such transactions prior to, at the time of and after the execution of the deed."

The intention is the controlling element in the construction of a deed.

Tiernan v. Jackson, 5 Pet., 580.
Stanley v. Colt, 5 Wall., 119, 166.
Calhoun Co. v. Am. Emigrant Co., 93 U. S., 124.
Pawlet v. Clark, 9 Cr., 292, 330.
Brown v. Jackson, 3 Wh., 449.
Reed v. Props. Locks & Canal, 8 How., 274, 288.
Steinbach v. Stewart, 11 Wall., 566.
Phila., etc., R. Co. v. Howard, 13 How., 307.
Irvin v. United States, 16 How., 513.
Williams v. Paine, 169 U. S., 55, 76.
Hughes v. Edwards, 9 Wh., 489, 494.
Hollingsworth v. Fry, 4 Dall., 345.
United States v. Arredondo, 6 Pet., 691, 740.

Other cases supporting the same principles are :

Mauson v. Bullus, 16 Pet., 528, 533.
United States v. Peck, 102 U. S., 64, 65.
Atkinson v. Cummins, 9 How., 479, 486.
Good v. Martin, 95 U. S., 90, 95.
Burdell v. Denig, 92 U. S., 716, 722.
Roy v. Simpson, 22 How., 341, 350.
The Confederate Note Case, 19 Wall., 548, 549.
Bell v. Bruen, 1 How., 169.
Montana Min. Co. v. St. Louis Min. Co., 204 U. S., 204, 214.
Mobile, etc., R. Co. v. Jurey, 111 U. S., 584.
Merriam v. United States, 107 U. S., 437, 441.
Canal Co. v. Hill, 15 Wall., 94.
United States v. Granite Co., 105 U. S., 35, 39.

There are number of State cases in which the question was whether the instrument in question was a mortgage or a conditional sale, in which the principles controlling are very well set forth and in which it is held that in determining whether it is a mortgage or conditional sale the intentions of the parties is controlling and that the true nature and intention is to be determined by the circumstances of each particular case, among which cases are :—

Chapman v. Turner, 1 Call, 294, and note.
Chase's Case, 1 Bland's Chan., 206, 17 Am. Dec., 277, 292 note.
Cornell v. Hall, 22 Mich. 383.
Voss v. Eller, 109 Ind., 264.
Alleghany R. R. Co. v. Casey, 79 Pa. St., 84, 97.
Bridges v. Linder, 60 Iowa, 190, 192.
Devore v. Woodruff, 1 N. D., 143, 148.
Smith v. Crosby, 47 Wis., 160, 166.
Flagg v. Mann, 14 Pick., 467, 480.
Johnson v. Clark, 5 Ark., 321, 342.
Hollingsworth v. Handcock, 7 Florida, 338, 346.
Whelan v. Scwartz, 1 Yeats, 579.
Southern Street Railway Co. v. Metropole Shoe Co., 46 Atl., 573.
Bigler v. Jack, 87 S. W., 700.

In *Devore v. Woodruff*, *supra*, the court speaks of the right of a conditional vendee as an "optional right," thus confirming Syme's characterization of the contract in this case.

In *Conway's Executors v. Alexander*, 7 Cr. (11 U. S.), 218, in which Chief Justice MARSHALL delivered the opinion, there was a bill to redeem on the theory that the conveyance was a mortgage. The court said among other things (p. 240) :

> "This, then, is a case in which there was no previous debt, no loan in contemplation, no stipulation for the payment of money advanced, no proposition for or conversation about a mortgage, it is a case in which one party certainly considered himself as makiag a purchase and the other appears to have considered himself as making a conditional sale."

And it was held : parol evidence having been admitted, that it was a conditional sale. An analysis of this case shows that it

is a very strong authority for appellees since in it the instrument was clearly a deed of trust.

This case was followed in *Russell v. Southard*, 12 How., 139. The Court said (p. 147):

> "It is insisted on behalf of the defendants that this question (whether a deed was what it purported to be) is to be determined by the inspection of the written papers alone, oral evidence not being admissible to contradict, vary, or add to their contents. But we have no doubt extraneous evidence is admissible to inform the Court of every material fact known to the parties when the deed and memorandum were executed. This is clear both upon principle and authority. To insist on what was really a mortgage as a sale is in equity a fraud which can not be successfully practiced under shelter of any written papers however precise and complete they may appear to be."

The foregoing cases have been uniformly followed.

In *Kuhn v. Fairmont Coal Co.*, 215 U. S., 349, the Court said (pp. 363, 364):

> "In *Russell v. Southard*, 12 How., 139, 147, the controlling question was whether in any case it was admissible to show by extraneous evidence that a deed on its face of certain real estate in Kentucky was really intended by the parties as a security for a loan and as a mortgage. The court, speaking by Mr. Justice CURTIS, after citing adjudged cases sustaining the proposition that evidence of that kind was admissible in certain States, said:
>
> > 'It is suggested that a different rule is held by the highest court of equity in Kentucky. If it were, with great respect for that learned court, this court would not feel bound thereby. This being a suit in equity, and oral evidence being admitted, or rejected, not by the mere force of any State statute, but upon the principles of a general equity jurisprudence, this court must be governed by its own views on those principles.'"

In *Cabrera v. American Colonial Bank*, 214 U. S., 224, the court said (pp. 230, 231):

> "In other words, the real transaction is permitted to be proved. The court said in *Peugh v. Davis*, 96 U. S., 332, 336, and repeated it in *Brick v. Brick*, 98 U. S., 516:
>
> > 'As to the equity upon which the court acts in such cases arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible.'
>
> The rule which excludes parole testimony, the court further said, has reference to the language used by the parties and does not forbid an inquiry into their object in executing and receiving the instrument."

In *Jackson v. Lawrence*, 117 U. S., 679, the Court said (p. 681):

> "It is also settled that evidence written or oral may be admitted to show the real character of the transaction."

In *Watts v. Camors*, 115 U. S., 353, the Court said (p. 362):

> "If it is considered as a question of the remedy and relief to be judicially administered, the equity and admiralty jurisdiction of the courts of the United States, under the national Constitution and Laws, is uniform throughout the Union, and cannot be limited in its extent, or controlled in its exercise, by the laws of the several States."

in *Babcock v. Wyman*, 60 U. S., 289, the Court said (p. 299):

> "Can the trust be established by parol testimony? If the doctrine of this court is to be adhered to, as laid down in the case of Russell v. Southard (12 How., 154), this is not an open question. In that

case the court say: 'To insist on what was really a mortgage, as a sale, is in equity a fraud.' And in Conway v. Alexander (7 Cranch, 238), Chief Justice Marshall says: 'Having made these observations on the deed itself, the court will proceed to examine those extrinsic circumstances which are to determine whether it was a sale or a mortgage.' In Morris v. Nixon (1 How., 126), the court say: 'The charge against Nixon is substantially a fraudulent attempt to convert that into an absolute sale, which was originally meant to be a security for a loan. It is in this view of the case that the evidence is admitted to ascertain the truth of the transaction, though the deed be absolute on its face.'"

In *Glover v. Payn*, 19 Wend (N. Y.), 518, the action was of ejectment. This case is very illuminating. Here was an action at law, and yet even in such a case, the Court applies the principle now contended for. The Court there said (BRONSON, J.) (p. 520):

"The deed of Payn and the lease or agreement, were executed at the same time and it is of no consequence that they bear date on different days. The Judge decided that the two instruments together amounted in law to a mortgage. I think he erred. * * * Defeasible purchases are narrowly watched * * * Still it is well settled that an agreement to reconvey either with or without an advance in price will not turn an absolute conveyance into a mortgage * * *

"(p. 521) But where there is no debt and no loan, it is impossible to say that an agreement to resell will change an absolute conveyance int a mortgage * * *

"(p. 522) Until the courts are prepared to make contracts for parties and to assume the guardianship of adults as well as infants, such a transaction as we have been considering can not be declared a mortgage. It is an absolute sale with a agreement for reconveyance; and the vendor must comply absolutely with the terms on which he is allowed to re-possess himself of the title, or his right will be at an end."

In *Reich v. Cochran*, 213 N. Y., 416, there were four instruments in writing dealing with a lease of certain premises in the City of New York. The action was to redeem from a mortgage, it being claimed that the instruments in legal effect constituted a mortgage upon the demised premises and all the furniture, fixtures and personal property thereon. The Court said (p. 422) :

> " The assignment and the collateral agreement to reassign on stated terms do not on their face constitute a mortgage. It will be necessary for the plaintiff to show by parol that the assignment was given as security for the payment of a debt. That he may do that in equity is well established (*Horn v. Keteltas*, 46 N. Y., 605; Odell v. Montross, 68 N. Y., 499; Russell v. Southard, 12 How., U. S., 139)."

In *MacDonald v. Crissey*, 215 N. Y., 609, a printed form of contract was used and the name of the vendor was not changed; but the Court held that extrinsic evidence was admissible to show what the actual contract was and with whom it was.

That parol evidence is admissible under circumstances such as in the case at bar is established by a host of authorities. If it is desired to consult further cases, they are collected in the Century Digest, vol. 35, under the title " Mortgages," Sec. 97; Dec. Digest, vol. 14, title " Mortgages," sec. 37, and in the Key Number Digest under the same title, sec. 37.

The parol evidence was not offered to change, alter, modify, or add to the language of the written instruments; but to show what the real contract between the parties was to prevent fraud being practiced by holding that to be a deed, absolutely conveying the property with a purchase money mortgage back, which was really a conditional sale, the condition of which was admittedly never performed (*Russell v. Southard*, *supra*, p. 147); nor is there here any attempt to reform the instruments, but the Court was asked as a preliminary to giving the relief asked, the quieting of the title and removal of cloud, to find that under the facts the legal effect of the transaction was a conditional sale.

Under the authorities parole evidence is admissible for

this purpose; and there was no error in the court below admitting and considering the testimony as to the legal effect of the transactions and the intention of the parties with reference thereto; nor in admitting and considering the testimony of Samuel A. M. Syme, that, in case the notes were not paid, the land should remain the property of himself and Mathews; that no sale was to be deemed to be made unless all the notes were paid and that, in case the notes were not paid, they as well as the deed and reconveyance should be void;

This disposes of the appellant's third and fourth assignments of error.

II.

The deed from Alexander F. Mathews and S. A. M. Syme to the Arizona Copper Estate, and the Reconveyance by the Arizona Copper Estate to said Mathews and Syme, were properly found in legal effect to be one instrument and to constitute a conditional sale.

There is no question that the two papers were executed simultaneously and as part of a single transaction.

Mr. Syme testified (rec., p. 35):

> "Both these papers were executed and delivered simultaneously."

They bear the same date and every indicia of this being a fact.

As said in *McKelvain v. Allen*, 58 Tex., 383, with reference to a deed of property and notes for the unpaid purchase money,

> "The notes and deed will be construed as one instrument and as an executory contract to sell land."

The cases cited under the preceding point also support this proposition, and it is not deemed necessary to cite further authority.

A court of equity looks beyond the terms of the instrument to the real transaction ; it will give effect to the actual contract of the parties. Any evidence, written or oral, which tends to show this is admissible. The rule which includes parol evidence does not go to evidence showing the purpose and object of the parties. Jurisdiction will always be exercised in equity to prevent fraud and oppression and to promote justice.

Brick v. Brick, 98 U. S., 516.
Peugh v. Davis, 96 U. S., 336.

As said in *Simon v. Etgen*, 213 N. Y., 589, at page 595,

> " equity looks through the form to the substance and purpose of the agreement, and moulds its decree in accordance with what the parties may fairly be presumed to have intended."

In *Vance v. Anderson*, 113 Cal., 532, 45 Pac., 818, the Court says :

> " Equity looks through the mere form in which the transaction is clothed and shapes its relief in such a way as to carry out the true intent of the parties to the agreement ; and to this end all the facts and circumstances of the transaction, the conduct of the parties thereto, and their declarations against their own interests, and their relations to one another and to the subject matter are subjects for consideration " (Citing *Campbell v. Freemnan*, 99 Cal., 516, 34 Pac., 113 ; *Peirce v. Robinson*, 13 Cal., 116 ; *Locke v. Moulton*, 96 Cal., 21, 30 Pac., 957 ; *Ross v. Bruisee*, 64 Cal., 245, 30 Pac., 811 ; *Taylor v. McLain*, 64 Cal., 513, 2 Pac., 399).

Bispham's Equity, 9th ed., sec. 7, expresses the idea in these words :

> " the decree can be so framed and moulded or its execution so controlled and suspended that the relative

> duties and rights of the parties can be secured and enforced. This capacity of moulding the decree to suit the exact exigencies of the particular case is indeed one of the most striking advantages which the procedure in chancery enjoys over that at common law."

Without expressing the rule in words, the Supreme Court in the Northern Securities Case, 193 U. S., 197, at page 353, applied it to the facts in that case saying:

> "It was said in the argument that the circumstances under which the Northern Securities Company obtained stock in the constituent companies imported simply the investment in the stock of other corporations—the purchase of that stock; * * * This view is wholly fallacious and does not comport with the actual transaction. There was no actual investment in any substantial sense by the Northern Securities Company in the stock of the two constituent companies. If it was in form such a transaction, it was not in fact one of that kind."

and the Court, looking "through the form to the substances" held it was a combination in violation of the Sherman Act, and that parole evidence was admissible to show the true transaction.

To the same effect see *Wagg v. Herbert*, 92 Pac., 250, 264; *Sadler v. Taylor*, 38 S. E., 583, 590.

Applying the principles established by those cases to the case at bar, we have the form adopted, a deed from Mathews and Syme to the Arizona Copper Estate (rec., pp. 72, 73) and a reconveyance by the Arizona Copper Estate to Mathews and Syme (rec., pp. 77–80) with a proviso written into the printed blank used, as follows:—

> "*Provided*, always that if said notes are paid according to their tenor and effect, then these presents shall become void and the estate hereby granted shall cease, determine and be void, otherwise to remain in full force and effect, * * *"

It was expressly conceded that no payment was made on the notes (rec., p. 37). Consequently by its very terms the reconveyance remained "in full force and effect."

In *Bogk v. Gossert*, 149 U. S., 17, the Supreme Court (p. 28) cites the case of *Wallace v. Johnstone*, 129 U. S., 58, 61, 64, of which it says:

> "The purpose of this case is that in the absence of proof of a debt or other explanatory testimony the parties will be held to intend exactly what they have said upon the face of the instruments."

This would seem to settle the matter against the appellant's contention upon the face of the instruments in the very form adopted; but an examination of the evidence in the case shows that the transaction was such that the same result follows from a different view of the contract.

The evidence which is set out in the statement of facts clearly establishes that the transaction, no matter what form was given to it by the parties, was actually a conditional sale for $100,000, and that no payment having been made the title remained in Mathews and Syme unaffected by the transaction.

This is what the Court below held, but whether considered as a conditional sale or a reconveyance subject to devestiture on payment of the price the result is the same the title remained in Mathews and Syme, no payment being made.

Another rule of construction applies here, that is, that where in a printed form written matter is inserted, the written portion prevails over the printed.

In the reconveyance from Arizona Copper Estate to Mathews and Syme, the proviso reading (rec., p. 79):

> "Provided always that if said notes are paid according to their tenor and effect then these presents shall become void and the estate hereby granted shall cease, determine and be void, otherwise to remain in full force and effect"

is inserted in writing.

This is inconsistent with the covenant prineed in the form giving the parties of the second part the power to sell the premises (rec., p. 79).

In *Heyn v. N. Y. Life Ins. Co.*, 192 N. Y., 1, the Court said (p. 6) :

> " Section 20 together with the main portions of the contract is upon a printed blank furnished by the defendant, and if its provisions are doubtful, uncertain or repugnant to the written portions of the agreement, that which is written should control the interpretation of the instrument."

The same principle was applied in *Fagan v. Alrich*, 166 A. D., 342.

The fact that a form for a mortgage without bond, under the New York practice, was used by Mr. Mathews is immaterial. The evidence is complete that no indebtedness existed etiher before the execution of the papers, at the time of their execution, or after their execution from the Arizona Copper Estate to Mathews and Syme or either of them ; nor is there any evidence that a loan was ever discussed between them or that there was anything said about a mortgage, all of which are facts necessary to be shown to establish that the instrument (rec., pp. 77–80) from the Arizona Copper Estate to Mathews and Syme was a mortgage as claimed by appellant (*Conway's Executors v. Alexander*, *supra*, p. 240 ; *Bogk v. Gossert*, 149 U. S., 17, 29). Moreover the provision for defeasance is inserted in the blank form in writing (see original of Plaintiff's Exhibit " C " rec., pp. 77–80) and therefore this provision for defeasance overrides the printed covenant giving Mathews and Syme the power to sell (*Heyn v. New York Life Ins. Co.*, 192 N. Y. 1, 6 ; *Fagan v. Ulrich*, 166 App. Div. 342, 344). This principle is so well understood that it is not necessary to cite any other or further authority.

From the foregoing it is clear that this Court, sitting in equity, will look through the form to the substance and determine the case according to what the actual transaction was in order to carry out the true intent of the parties.

In doing this the Court must find that the Court below did not err in finding that the deed from Mathews and Syme to

to Arizona Copper Estate and the reconveyance by the latter to the former were to be construed as one instrument and constituted a conditional sale of the land therein referred to, or in not finding that such reconveyance was a mortgage.

This disposes of the first and second assignments of error of the appellant.

III.

The full legal title to the said land was at the time of the commencement of this action and is now in the plaintiffs.

The title to said land remained in Alexander F. Mathews and Samuel A. M. Syme notwithstanding the execution and delivery of the two instruments (rec., pp. 72-80).

Whether the Court agrees with the contention heretofore made in this Brief, that the transaction evidenced by said instrument was a conditional sale ; or whether it finds that Plaintiffs' Exhibit B is a deed and Plaintiffs' Exhibit C is a purchase money mortgage, the same result follows.

It is respectfully submitted that what has been said establishes that the transaction was a conditional sale, and in that event, the condition not having been performed, the title never passed. It is not understood that the Appellant's Brief suggests that title passed, if it be found that the transaction was a conditional sale.

A deed and a purchase money mortgage is construed as one instrument to such an extent as to prevent the title conveyed by the deed vesting in the grantee even for an instant of time so as to permit the dower right of the wife of the grantee to attach to the land.

If it be held that Plaintiffs' Exhibit B was a deed and Plaintiffs' Exhibit C a purchase money mortgage cotemporaneously taken the superior title remained in Mathews and Syme, and could only be divested by payment of the price, which was not done.

In *Dicken v. Cruse*, 176 S. W., 655 (Tex. Civ. App., Apr. 7, 1915, rehearing denied April 29, 1915), the court said (p. 657) :—

> " The deed, mortgage, notes and bill of sale were all executed by the same parties and simultaneously. The mortgage is based upon the notes and they are proven by the admissions of Gilder in his answer to the suit thereon by Minter to have been executed as a part of the consideration for the sale of the personality and realty under mortgage. All the instruments being parts of and in reference to the same subject-matter, the effect of the simultaneous execution of the same would be to constitute them but one act and to require them to be construed as but one and the same instrument (*Howard v. Davis*, 6 Tex., 181 ; *Dunlap v. Wright*, 11 Tex., 597).
>
> * * * * * *
>
> there was an executory contract for the conveyance of the tract of land out of the Tatman league, the superior title remaining in Minter and his wife and which could be divested by Gilder or his vendees only by payment of the purchase price (*Masterson v. Cohen*, 46 Tex., 520 ; *Jackson v. Palmer*, 52 Tex., 427 ; *Webster v. Mann*, 52 Tex., 416 ; *Hale v. Baker*, 60 Tex., 217.)"

In *Woodward v. Ross*, 153 S. W. 158, the Court said :

> " Where a vendor's lien is expressly retained in the deed, or a cotemporaneous mortgage is given, the legal title remains with the vendor. * * * "

In *De Steaguer v. Pittman*, 117 S. W. 481, the Court held that a deed of land reserving a vendor's lien to secure the deferred payments vests in the purchaser only an equity in the land and the superior legal title remains in the vendor, and the purchaser failing to pay the price does not acquire title.

In *Evans v. Ashe*, 108 S. W., 393, it was held that where the conveyance reserved a vendor's lien for the payment of the price, a written instrument was not required to defeat the grantee's rights on his failure to pay the price as agreed.

To the same effect see:

Anderson v. Silliman, 92 Tex., 560 ;
New Eng. L. & Tr. Co. v. Willis, 19 Tex., Civ. App., 128 ;
Efrom v. Burgower, 57 S. W., 306 ;
Lucey v. Smith, 111 S. W., 965 ;
Miller v. Linguist, 141 S. W., 170 ;
McKelvain v. Allen, 58 Tex., 383 ;
Dunlap's Admr. v. Wright, 11 Tex., 597 ;
Baker v. Ramey, 27 Tex., 59 ;
Baker v. Clipper, 26 Tex., 629 ;
Baker v. Compton, 52 Tex., 261 ;
Peters v. Clements, 46 Tex., 114 ;
Roosevelt v. Davis, 49 Tex., 261, 176 S. W., 633 ;
Lundy v. Pierson, 67 Tex., 233 ;

From the foregoing it is submitted that even if it should he held that Mathews and Syme deeded the property to the Arizona Copper Estate and the Copper Estate contemporaneously gave a purchase money mortgage, nevertheless, the Copper Estate having admittedly failed to pay the price, the title remained in Mathews and Syme, and as stated in one of the cases cited no written instrument was required to defeat the title of the Arizona Copper Estate.

Syme and the representatives of Mathews conveyed the property to the plaintiffs (rec., pp. 67–70). The Court below did not err in holding that the full legal title to the land was in the plaintiffs, and that the Arizona Copper Estate acquired no interest in the land.

IV.

The instruments, Plaintiff's Exhibits B and C, constitute a cloud upon the plaintiffs' title, and the title should be quieted and the cloud removed.

If it is necessary to produce extrinsic evidence to show that a semblance of title, either legal or equitable, which, if

valid, would effect or encumber the title is invalid, there is a cloud created upon the title.

Graves v. Ashburn, 215 U. S., 331.
Ogden Co. v. Armstrong, 168 U. S., 224.
Rich v. Braxton, 158 U. S., No. 75.
Johnson v. Kramer, 203 F., 733, 742.
Accord v. West, etc. Corp., 156 F., 189, 998; aff'd, 174 F. 119.
Thompson v. Pinnell, 237 Mo., 545; 141 S. W., 605.
Allott v. Am. S. Co., 237 Ill., 55; 86 N. E., 685.
Glos v. People, 259 Ill., 332, 342; 109 N. E., 763.
Parker v. Smith-Brent L. Co., 47 So., 580.
McArthur v. Griffith, 61 S. E., 519.

Here extrinsic evidence, at least to show that no payment was made, was required; and hence the instruments created a cloud upon the plaintiff's title within the definitions given in the foregoing cases.

This being so, and it appearing that upon the facts the semblance of title in the Arizona Copper Estate was invalid, the Court below properly found the instruments to create a cloud upon the plaintiffs' title and barred the Arizona Copper Estate and its successors in interest from asserting any interest or title under the said deed and reconveyance.

This point, and the preceding point, dispose of the appellant's Fifth and Sixth assignments of error.

V.

The plaintiffs were not guilty of laches in bringing this action, nor are they barred by any Statute of Limitation from being entitled to the relief sought, that is, the quieting of title in them and the removal of the cloud.

It was stipulated by counsel that the land was segregated from the public domain by the filing of the plat of survey in December, 1914 (rec., p. 49), so that neither the plaintiffs nor the Arizona Copper Estate prior to that time

were entitled to possession, and the plaintiffs did not take possession until after the decision of the Supreme Court June 22, 1914, directing the filing of the Contzen survey to which the stipulation applies; and the Arizona Copper Estate never has had possession.

Moreover, this being an action to quiet title and remove cloud, was not barred by any statute of limitation.

In *Reich v. Cochran* (citing *Miner v. Beekman*, 50 N. Y., 337, 343), *supra*, at page 425, the Court said:

> "In that case Judge GROVER said, referring to a case where the mortgagor had continued in possession, that the right to maintain the action for the purpose of removing a cloud from title is a continuing right 'that may be asserted at any time during the existence of the cloud; never barred by the statute of limitations while the cloud continues to exist.'"

In *Woodward v. Ross*, 153 S. W., 158, the Court said:

> "Where a vendor's lien is expressly retained in the deed or a contemporaneous mortgage is given, the legal title remains with the vendor and he may convey the land though the purchase money notes are barred by limitation. There is an unbroken line of authority to this effect beginning with *Howard v. Davis*, 6 Tex., 174, and going through numerous decisions down through *Atterbury v. Burnett*, 102 Tex., 118."

Hence the Arizona Copper Estate in this case cannot object to the plaintiffs' action on the ground that it is the mortgagor in the purchase money mortgage when, by reason of the statute of limitations, such mortgage is barred, and it does not offer to pay the debt secured thereby.

In *Ruggio v. Palmtag*, 155 Cal., 797, 801, it was held that a mortgagor's assignee can not quiet title against a mortgagee in possession without paying the debt.

This disposes of the appellant's Seventh and Eighth Assignments of error, and the foregoing points dispose of the 9th assignment of error—that is, that the Court erred in not dismissing the bill on the merits.

VI.

The so-called mortgage is not on its face a mortgage.

The paper (rec., pp. 77–80) conveys the property in the usual form of a deed without covenants and then after the habendum a recital is inserted that certain notes have been executed by the grantor which is followed by another habendum clause and then comes the written insertion of the proviso that if the notes are paid the conveyance becomes void which is followed by the printed covenants to pay and that the grantees may sell.

There is no statement preceding the conveying portion of the instrument of any indebtedness as is usual in a mortgage, nor is there any statement of an intention to secure any indebtedness. The recital of the execution of the notes is entirely consistent with the undisputed oral testimony that there was no debt, and that it was not intended that the Arizona Copper Estate should be indebted if the notes were not paid. The notes were executed merely as a convenient form of stating the instalments of the purchase money and the times of their payment and probably to give greater verisimilitude to the transaction as a sale and purchase money mortgage for the purpose of enabling Dorsey the better to carry out his scheme to raise money on the security of the property. In this view there is no inconsistency in the promise to pay, since it was anticipated that the purchaser expected and proposed to pay the purchase price. Nor is there any inconsistency in the covenant giving a power to sell in case of default since in the case if a conditional sale the vendor would have the power without any covenant of the vendee because the sale would be void. For similar reasons there is no significance to be attached to the fact that the stamps required for a mortgage are affixed to the paper, for this was necessary to carry out Dorsey's purpose of making it appear to any one to whom he applied for money that it was an ordinary sale with a purchase money mortgage back.

But the paper on its face is plainly not a mortgage, what-

ever it may be, since it is a conveyance to third persons, not to the payees of the notes. The distinction between a mortgage and a deed of trust is stated clearly in Words and Phrases, v. 5, p. 4602, and cases cited. Under those cases this paper is a deed of trust rather than a mortgage, if it is either. If it be held to be a deed of trust Syme, as surviving trustee, exercised the power of sale when he joined in the deed to Watts and Davis since under the Arizona statutes at that time no notice was required to be given of a sale. The sale being made without application to the court or any court proceedings the statute of limitations did not apply.

Grant v. Burr, 54 Cal., 298.
Travelli v. Bowman, 150 Cal., 537, 590.
Rowe v. Mulvane, 139 Pac., 1041.

Certainly whether a mortgage or deed of trust the debtor cannot have his title quieted without paying the debt.

Raggio v. Palmtag, 155 Cal., 797, 801.
Puckhaber v. Henry, 152 Cal., 419, 423.
Marshutz v. Seltzer, 5 Atl., 140, 145.

No notice of sale required, may be private, no
2358-2359. Stats. Arizona, 1887. In force 1899, at
made. No notice of sale, and may be private. Stat
It was not until 1913, power was only to be exercised
Sale in this case was made in 1907. As neither instr
required notice, advertisement or public sale, privat
notice was valid. 27 Cyc. 1466.

Finally, because it would be monstrous if an equity court by its decree should give this property to the Arizona Copper Estate or its assignee when it never paid one cent of the hundred thousand dollars it agreed to pay.

In *Dunlap's Adm'r. v. Wright*, 92 Am. Dec., 506, 11 Tex., 597, the action was in ejectment to try title by the mortgagor in a purchase money mortgage ; and the court said (p. 604) :

> " The effect of a judgment in this case would be to eject the original owners out of a possession held by them for many years and to admit to the possession

the vendee who by his acts has evinced an intention to abandon the contract, who has not paid or offered to pay a farthing of the purchase money, who pledged the land at the instant of the purchase or in the language of the cases conditionally revested the fee; this defaulting vendee being inducted into possession the vendor is left without a shadow of redress as the bond and mortgage have been barred by limitation. Such consequences are too monstrous to be tolerated. They are not sanctioned by any principle of law or justice."

SAMUEL L. KINGAN,
HARTWELL P. HEATH,
Attorneys for Watts and Davis.

HERBERT NOBLE,
SAMUEL L. KINGAN,
Of Counsel.

redemption. Secs.
ime papers were
Arizona, 1901.
y foreclosure.
ent nor statute
sale, without

ever it may be, since it is a conveyance to third persons, not to the payees of the notes. The distinction between a mortgage and a deed of trust is stated clearly in Words and Phrases, v. 5, p. 4602, and cases cited. Under those cases this paper is a deed of trust rather than a mortgage, if it is either. If it be held to be a deed of trust Syme, as surviving trustee, exercised the power of sale when he joined in the deed to Watts and Davis since under the Arizona statutes at that time no notice was required to be given of a sale. The sale being made without application to the court or any court proceedings the statute of limitations did not apply.

Grant v. Burr, 54 Cal., 298.
Travelli v. Bowman, 150 Cal., 537, 590.
Rowe v. Mulvane, 139 Pac., 1041.

Certainly whether a mortgage or deed of trust the debtor cannot have his title quieted without paying the debt.

Raggio v. Palmtag, 155 Cal., 797, 801.
Puckhaber v. Henry, 152 Cal., 419, 423.
Marshutz v. Seltzer, 5 Atl., 140, 145.

VII.

The decree of the Court below should be affirmed.

Finally, because it would be monstrous if an equity court by its decree should give this property to the Arizona Copper Estate or its assignee when it never paid one cent of the hundred thousand dollars it agreed to pay.

In *Dunlap's Adm'r. v. Wright*, 92 Am. Dec., 506, 11 Tex., 597, the action was in ejectment to try title by the mortgagor in a purchase money mortgage ; and the court said (p. 604) :

> " The effect of a judgment in this case would be to eject the original owners out of a possession held by them for many years and to admit to the possession

the vendee who by his acts has evinced an intention to abandon the contract, who has not paid or offered to pay a farthing of the purchase money, who pledged the land at the instant of the purchase or in the language of the cases conditionally revested the fee; this defaulting vendee being inducted into possession the vendor is left without a shadow of redress as the bond and mortgage have been barred by limitation. Such consequences are too monstrous to be tolerated. They are not sanctioned by any principle of law or justice."

SAMUEL L. KINGAN,
HARTWELL P. HEATH,
Attorneys for Watts and Davis.

HERBERT NOBLE,
SAMUEL L. KINGAN,
Of Counsel.

2663

United States
Circuit Court of Appeals
For the Ninth Circuit

ARIZONA COPPER ESTATE,
a corporation,

Appellant,

vs.

CORNELIUS C. WATTS and
DABNEY C. T. DAVIS, Jr.

Appellees.

Additional Brief for Appellees

WATTS AND DAVIS

HARTWELL P. HEATH
HERBERT NOBLE
S. L. KINGAN
Attorneys for Appellees.
WATTS AND DAVIS

Filed this .....day of....., 1916.

Clerk.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

ARIZONA COPPER ESTATE,
a corporation,

Appellant,

vs.

CORNELIUS C. WATTS and
DABNEY C. T. DAVIS, Jr.

Appellees.

ADDITIONAL BRIEF FOR APPELLEES.

HARTWELL P. HEATH,
HERBERT NOBLE,
S. L. KINGAN,
Attorneys for Watts and Davis.

STATEMENT OF FACTS.

Alexander F. Mathews and S. A. M. Syme were the owners of a tract of land in Arizona, of approximately one hundred thousand acres, known as Baca Float No. 3. They wanted to sell the land. Through Col. Boyce, acting as a broker, Syme and Senator Dorsey, a prospective purchaser, met. They first talked about an option, and some three months or so prior to August, 1899, a paper was signed by Syme, in which he agreed to sell the Float to Dorsey for $125,000. (Abstract, Folio 37.)

This agreement came to nothing and was cancelled. Later, negotiations were again taken up between Syme and Dorsey. Dorsey wanted a deed to the property "because he said that he thought he could use that better." (Abstract, Folio 30). In his affidavit, Dorsey says: "It was finally agreed that the purchase price of the property should be $100,000, to be paid in various sums and at various times, running over about two years. My plan was to form a corporation to which the property could be deeded and which could then raise on the property a sum sufficient to pay the purchase price. It was therefore arranged that the property should be deeded to the corporation, but, as the sale was not to be made unless and until the price was paid, it was arranged that the corporation would reconvey the property to the then owners, subject to divestiture if the purchase price was paid as agreed." (Abstract, Folio 72). "This form was adopted as the simplest and the one which would enable the corporation to handle the property easiest in raising the money required. There was never any intention that in case the corporation should not be able to raise the money, it should be indebted to those named in the amount of the notes or in any amount." (Abstract, Folio 73). Syme says, as before stated, that Dorsey wanted a deed because he said he thought that he could use that better. "He wanted to give me a deed in exchange at the same time." Syme says further: "Dorsey wanted the property. I told him that I would sell him that property for $100,000. He was to pay me $5,000 personally, in cash; and $100,000 for the property." "Dorsey said he would agree to this if I would give him

a deed. I objected to the deed to some extent and then he explained to me that the deed would be in effect of such a character that the property would be held by us and the title in us, and not go out of us, and if the notes weren't paid the whole property would be in us still, and everything would be void, notes and all." (Abstract, Folio 30). Dorsey says: (Abstract, Folio 73) "my understanding has always been and is now that the transaction, on account of the failure of the Arizona Copper Estate to make the payments agreed on, was as though it had never taken place, and that Mathews and Syme had the title to the property free of any claim on the part of those who had proposed to organize the corporation, or of the Arizona Copper Estate itself." Syme again stated: "If the notes weren't paid, all the notes weren't paid, the property was to remain in us and the notes were to become void and the whole thing wiped out." (Abstract, Folio 31). "The $5,000 was not to be a part of the purchase price but was to come to me personally. He was to pay me $5,000 for giving him an option for a certain period." "My dealings were entirely with Senator Dorsey and I made my agreement with Senator Dorsey." (Abstract, Folio 32).

The agreement having been made, Mathews and Syme went to New York, August 3, 1899, and there met Dorsey, Philip K. Reynolds, and James Simmonds. Here, the terms of the agreement were restated. "In substance it was said amongst all of us, you know, that if all the notes weren't paid everything became void, the notes and all, and the thing passed off and we stood the original

grantors, Mathews and myself, holding the title." (Abstract, Folio 32). A deed was then and there executed by Mathews and Syme to the Copper Estate, plaintiff's Exhibit "B", and simultaneously plaintiffs' Exhibit "C", whether it be mortgage or reconveyance, was executed and delivered to the grantors. Notes aggregating $100,000 were signed by the Arizona Copper Estate. Of these notes, $20,000 were delivered to Mathews as trustee, $26,758 to Mathews personally, Colonel Boyce received $24,121 of the notes, and Syme $29,121. The notes given to Boyce were a commission. "Those delivered to Colonel Boyce were given simply as a commission for making a sale of this property. If there was a sale he got that much commission out of the sale of the moneys we received. That is all the interest he had in it. It was only a commission; if the notes weren't paid, Boyce was not to get anything." (Abstract, Folio 35). The $5,000 was paid by Dorsey. (Abstract, Folio 37). This $5,000 was paid, not for the property, but for an option or deed for a certain period. (Abstract, Folio 31). Syme gave $1,000 of this amount to Mathews, and $2,000 to Boyce, and took in exchange therefor a larger amount of notes. That is to say, that $1,000 from Mathews and $2,000 from Boyce, that they would have received in notes was transferred to Syme, so that he received more in notes to the extent of $3,000 than he otherwise would have received. (Abstract, Folio 39). Syme considered that the price of the property, $100,000, was a good price for it. (Abstract, Folio 39). When Syme, Mathews and Dorsey were leaving the office in New York, it was stated by Mathews, in the presence of Dorsey, that

if the notes were not paid, the whole thing amounted to nothing and it stood just as it did before. That the whole transaction would be null and void, including the notes, and that the title would be in Mathews and Syme. (Abstract, Folio 40). There was no loaning or borrowing of money, and on the day the papers were drawn and delivered, August 3, '99, neither Dorsey nor the Copper Estate owed any money to Mathews or Syme. (Abstract, Folio 41.) Syme states that he considered the paper in the nature of an option and that he and Mathews conveyed the property to the Copper Estate, and that it reconveyed it to them, so that they could get control of the property if the notes were not paid as they already had the property, that is, the title of the property. "The title was in us," Syme says, "but the control for the time being limited by the notes to me and Mathews, was out of us." "When I use the words 'come back' I mean control. There is a difference between coming back and control. Do you understand me? They had the control during the limit of the notes." If the notes were not paid "then the control came back and Dorsey had nothing more to do with the property, and everything was void, notes and all." (Abstract, Folios 42-43). Dorsey says, as already quoted: "my understanding has always been and is now that the transaction, on account of the failure of the Arizona Copper Estate to make the payments agreed on, was as though it had never taken place, and that Mathews and Smye had the title to the property free of any claim on the part of those who had proposed to organize the corporation or of the Arizona Copper Estate itself." (Abstract, Folio 73).

THE TRANSACTION OF AUGUST 3, 1899, BETWEEN MATHEWS AND SYME AND THE ARIZONA COPPER ESTATE CONSTITUTED IN REALITY AN OPTION TO SELL BACA FLOAT NO. 3 FOR $100,000, AND THE $5,000 PAID WAS FOR THE OBTAINING AND GRANTING OF THE OPTION. THE TWO PAPERS EXECUTED, THE DEED AND THE MORTGAGE OR RECONVEYANCE, WERE IN REALITY NOT A DEED OR A MORTGAGE BUT WERE THE FORM ADOPTED BY THE PARTIES IN CARRYING OUT THEIR OPTION AGREEMENT, BOTH DEED, MORTGAGE AND NOTES, ALL TO BECOME VOID IF THE PURCHASE PRICE WAS NOT PAID.

First of all and underneath all, the parties had an agreement. That agreement was that Syme would grant an option or obtain an option, to be in the form of a deed, and was to receive for this the sum of $5,000. That the purchase price of the property should be $100,000, none of which was to be paid, but all of which was to be evidenced by notes, extending over a certain period of time. That Dorsey, or the Copper Estate, should reconvey the title, and that, if the purchase money was not paid, the entire transaction was to be considered of no force or effect and as if it had never been made, and the parties were to remain as they were at the beginning of the negotiations. There never was to be a debt, the Copper Estate was not to be bound to pay the $100,000, but if it didn't pay the notes, the notes were to be void. This was the agreement, and

this is the base and foundation upon which the rights and equities of the parties must be determined.

The transaction has all of the earmarks of an option. A price was to be paid to Syme for obtaining or bringing about the deal. Boyce was to obtain and have a commission to be paid if a sale was made. Neither Dorsey nor the Copper Estate was to be bound to purchase the property nor bound to pay the notes or any sum whatever. If the purchase price was not paid at the time mentioned, the entire transaction was to end, and the parties to owe each other nothing and to be as they originally were. The deed was actually not a deed nor was the paper back a mortgage or a re-conveyance. These papers were simply the vehicles used by the parties to carry out the option. Dorsey wanted the transaction in this form as it would best enable him to raise money and to dispose of the Float; but there never was any intention that the deed or the reconveyance should have any existence separate from or independent of the contract, but that they were subsidiary to the contract and were to be controlled entirely by it. There could not be a mortgage because there was no debt. It would have been impossible for Syme and Mathews to have foreclosed the mortgage and sued on the notes because the contract was that if the notes were not paid, they were to be void. There being no debt, there could be no foreclosure. Had an attempt been made to have foreclosed the so-called mortgage, undoubtedly Dorsey would have stated, as he has stated in his affidavit in this case, that there was no debt and Mathews and Syme would have

been compelled to have admitted it, and therefore there could have been no foreclosure.

The deed, then, and the mortgage or reconveyance, are in equity not a deed nor a mortgage. It was never intended that they should carry title or reconvey title except in the event of a sale and the payment of the money. As the money was not paid, they never were a deed or a mortgage, and in equity the title was in and always has been in Mathews and Syme, and their grantees.

THE ADMISSION OF PAROL EVIDENCE TO IMPEACH AN INSTRUMENT IN WRITING TO SHOW THAT IT IS NOT IN REALITY WHAT IT APPEARS TO BE AND TO SHOW THE OBJECTS AND PURPOSES THE PARTES HAD IN EXECUTING IT IS NOT A VIOLATION OF THE PAROL EVIDENCE RULE.

"A court of equity, we there state, looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security and not of sale, it will give effect to the actual contract of the parties. As the equity upon which the court acts in such cases arises from the real character of the transaction, any evidence, written or oral, tending to show this, is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import but must speak for itself. The rule does not forbid going into the object of the parties

in executing and receiving an instrument. Thus it may be shown that a deed was made to defraud creditors, or to give a preference, or to secure a loan or for any other object not apparent on its face. The object of parties in such cases will be considered by a court of equity; it constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent fraud or op pression and to promote justice." Mr. Justice Field. Brick v. Brick, 98 U. S. 516. Peugh v. Davis 96 U. S. 336.

Also see Southern Street Railway Co. v. Metropole Shoe Co., Court of Appeals of Maryland, 46 Atl. 573, where a large number of authorities are cited and quoted, and where the language of Mr. Justice Harlan, in Burke v. Dulaney, 153 U. S. 234, is quoted as follows: "The rule that excludes parol evidence in contradiction of a written agreement, presupposes the existence in fact of such agreement at the time suit is brought. But the rule has no application if the writing was not delivered as a present contract and parol evidence was admissible to show that there never was any concluded, binding contract, entitling the plaintiff, who claimed the benefit of it, to enforce its stipulations."

ANOTHER VIEW STATED BY SEVERAL COURTS IS, THAT WHEN A QUESTION ARISES WHETHER A TRANSACTION IS A CONDITIONAL SALE OR A MORTGAGE THAT A COURT OF EQUITY WILL LOOK AT THE ENTIRE TRANSACTION, ORAL AS WELL AS WRITTEN, AND FROM THE ENTIRE TRANSACTION GATHER THE IN-

TENT OF THE PARTIES, AND THIS INTENT, WHEN ASCERTAINED, WILL CONTROL THE ENTIRE TRANSACTION.

The supreme Court of West Virginia, in Sadler v. Butler, 38 S. E., 583, says: "The intention of the parties is the only true and infallible test, and this intention is to be gathered from the circumstances attending the transaction and the conduct of the parties, as well as from the face of the written contract." Jones on Mortgages, 258: "If, upon the whole in this action, it shall appear that a security for money was intended, it is a mortgage whatever be its terms, and if, on the other hand, it shall upon the whole appear that it was a conditional sale, the performance of the condition punctually at the time may not be dispensed with." In this case the court held that the test is whether or not a debt existed. If a debt existed, the instrument would be called a mortgage; if it did not exist, it would be a conditional sale.

In Bigler v. Jack, Supreme Court of Iowa, 87 N. W. 700, the court quotes from Pomeroy's Equity, Sec. 1195, and say: "Whether any particular transaction does thus amount to a mortgage or to a sale with a contract of repurchase must to a large extent depend upon its own circumstances, for the question finally turns in all cases upon the real intention of the parties as shown upon the face of the writings, or as disclosed by extrinsic evidence."

Attention is also called to the case of Slutz v. Dusen-

berg, 28 Ohio St. 371, where the court say that the inquiry must be whether the contract is a security for the payment of money or not and whether the creditor would have a remedy against the person of the debtor. In this case many authorities are cited.

In the case at Bar, there could not be a mortgage because there never was at any time a debt. The evidence that there was no debt is uncontradicted and is testified to by the only two living persons who were present and knew about the transaction, Syme and Dorsey. The reconveyance back, therefore, could not, by any possibility, be a mortgage, and it should be given the effect that the parties intended it to have, namely, that, taken together with the conveyance to the Copper Estate, of a conditional sale.

THE EQUITIES IN THIS CASE ARE VERY POWERFUL UPON THE SIDE OF WATTS AND DAVIS AND A GREAT INJUSTICE AND WRONG WOULD BE DONE IF THE CONTENTIONS OF THE APPELLANTS SHOULD BE UPHELD.

The Arizona Copper Estate has never paid one dollar for the property. It has never been in possession of the property. From 1899, up until 1915, it never made any claim to have any interest whatever in the property. The Arizona Copper Estate has really never, at any time, made any claim to the property and in fact is not now making any claim to the property. Had it not been for the activity of the Santa Cruz Developmnt Company, the defendant in another action, we think it is very clear

that the Arizona Copper Estate would never have answered in this lawsuit or made any pretension or claim to ownership.

It appears that in June, 1914, Senator Dorsey, the person with whom the contract was made, and the president of the Arizona Copper Estate, made the statement we have already quoted, to the effect that there never was a debt and that the whole transaction was as if it had never existed, by reason of the non-payment of the money. In the face of this affidavit, therefore, we think it proper to say that the Arizona Copper Estate, as such, would never have set up or claimed any interest whatever in the land. But it appears from a statement of Mr. Brevillier, Solicitor for the Santa Cruz Development Company, and found in folios 48-49 of Abstract of Record, that after Dorsey had made his affidavit, Dr. Root, acting for Mr. Brevillier, proceeded to Los Angeles to see Mr. Dorsey and that thereafter Mr. Vroom, president of the Santa Cruz Development Company, who is well acquainted with Senator Dorsey, wrote him and asked him if he, Dorsey, would make a deed of the land, and that after some negotiations the Copper Estate, by Dorsey as president, made the deed. It does not even appear that the Copper Estate employed Mr. Hill in this case; but it does appear that Mr. Brevillier, attorney for the Santa Cruz Development Company, asked Mr. Hill if he would appear in this case, and that Brevillier told him he would get authority from Dorsey, and that subsequently Dorsey did send the authorization such as it was to Mr. Hill. Mr. Brevillier states that, as a matter of

business policy, he thought it advisable to get the deed from the Copper Estate. So that, as a matter of fact, the Copper Estate has never answered in this case and never appeared in it; but that the Santa Cruz Development Company, has used it as a cat's paw as it were for its own benefit in the other lawsuit in which it is interested.

It would indeed be monstrous, in view of the uncontradicted facts in this case, that a sale was never intended unless the purchase money was paid, that there never was intended to be a conveyance of title unless the purchase money was paid, that there never was a debt or claim of debt, that there never was any obligation on the part of the Copper Estate or any of its officers to pay, that the agreement was that if the money was not paid, the whole transaction was to be naught, it would indeed, we say, be monstrous, under such conditions, to permit the appellant now, who has never paid one dollar to the owners of the land, to obtain this land, under the mere technicality that the real facts of the transaction could not be shown.

IF, FOR ANY REASON, IT SHOULD BE HELD THAT THE SO-CALLED MORTGAGE IS SUCH, THEN WE CALL ATTENTION TO THE FACT THAT IT CONTAINS A POWER OF SALE.

Under no circumstance could the instrument be technically a mortgage or technically a deed of trust; but it is in reality a mortgage with power of sale, partaking of the nature of both. The notes were given to Boyce, Syme and Mathews, and Mathews, Trustee, who

were all interested in making a sale; but the mortgage was given to Mathews and Syme alone, and to them was given the power of sale. There is no provision in the mortgage for notice in the event of a sale or for any procedings, the words being merely that the sale shall be according to law. As the property is situated in Arizona, the laws of Arizona must control. At the time the mortgage was given, the laws of Arizona did not require that any notice be given in the event of a sale under a power, and did not require that the sale be public. This being true,, it lay in the power of the mortgagees to sell at private sale and without notice. Also at the time of the execution of the paper, there was no redemption in Arizona from a sale under a power. Mathews and Syme, therefore, had the right, even treating the paper as a mortgage, to sell the property at any time that the notes were not paid, at private sale, without notice. Mathews died in 1907, and therefore the right to sell was in Syme. In this year and after Mathews death, Syme and the heirs of Mathews sold the property to the present appellees, Watts and Davis, in this action. It is true that Syme and the heirs had no intention when they sold of selling under the mortgage because in reality there was no mortgage; but, if it should be held that the paper was a mortgage, then, regardless of intent, the property was actually sold by a person having a right to sell, and the title passed.

HARTWELL P. HEATH,
HERBERT NOBLE,
S. L. KINGAN,
Attorneys for Watts and Davis.